Supreme Court, U.S.
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NO_____

IN THE
SUPREME COURT OF THE UNITED STATES

SHERRI YAX, BRYAN TRAYNOR, and PATRICK DZAGULONES,
Petitioners

v

UPS a/k/a UNITED PARCEL SERVICE and LIBERTY MUTUAL INSURANCE COMPANY, foreign corporations,
Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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No. 05-1843
Yax v. UPS et al.

NOT RECOMMENDED FOR PUBLICATION
No. 05-1843

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHERRI YAX, BRIAN TRAYNOR,)
and PATRICK DZAGULONES,)
)
Plaintiffs-Appellants,)
)
v.)
)
UPS a/k/a UNITED PARCEL)
SERVICE and LIBERTY)
MUTUAL INSURANCE CO.,)
)
Defendants-Appellees.)

Before: SILER, McKEAGUE, and GRIFFIN, Circuit Judges

SILER, Circuit Judge. Former UPS employees Sherri Yax, Brian Traynor, and Patrick Dzagulones ("Pl aintiffs") file suit against UPS and Liberty Mutual ("Defendants") claiming violations of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"), and the Michigan Worker's Disability Compensation Act of 1969, M.C.L. § 418.101, *et seq.* ("WDCA"). Ultimately, the district court dismissed all of Plaintiffs' allegations for failure to state a claim under Fed. R. Civ. P.12(b)(6). For the following reasons, we affirm the judgment, except for the state-law claims that we remand for the entry of an order of dismissal without prejudice.

BACKGROUND

Plaintiffs are former employees of UPS who claimed to have been injured during the course of their employment with UPS. After the alleged injury, each Plaintiff applied for and was awarded workers' compensation benefits. Beginning in September 2002, Liberty Mutual, UPS's workers' compensation insurance provider, filed a " Notice of Dispute" in each case with the Michigan Bureau of Workers' Disability Compensation ("Bureau") contesting the award of benefits to each Plaintiff on the ground that there was no continuing disability. All Plaintiffs ceased receiving workers' compensation benefits in 2002 or 2003.

In 2003, Plaintiffs sued Defendants in the Eastern District of Michigan alleging (1) Defendants fraudulently deprived them of their workers' compensation benefits through a pattern of racketeering activity, specifically mail and wire fraud, in violation of RICO, (2) wrongfully terminated benefits, and (3) retaliated for filing workers' compensation claims in violation of M.C.L. § 418.301(11). The district court dismissed all of Plaintiffs' claims pursuant to Rule 12(b)(6), except for Plaintiffs' RICO claims against UPS. With respect to the RICO claim against UPS, the district court found that Plaintiffs had failed to state a claim in their amended complaint on that action, but is granted "Plaintiffs' Motion to amend as to their RICO claim against Defendant UPS only" and allowed that claim to proceed. Plaintiffs filed a second amended complaint reasserting their prior RICO claims against both UPS and Liberty Mutual and also asserting for the first time an intentional infliction of emotional distress (" IIED") claim against the Defendants. The district court dismissed with prejudice Plaintiffs' entire complaint pursuant to Rule 12(b)(6). Plaintiffs appeal only the district court's dismissals of their RICO and IIED claims.

STANDARD OF REVIEW

A district court's decision on a motion to dismiss under Rule 12(b)(6) is generally reviewed *de novo by an appellate court. Simon v. Pfizer Inc.*,398 F.3d 765, 772 (6th Circ. 2005).

ANALYSIS

A. RICO Claim

RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Plaintiffs alleged that Defendants violated § 1961 (c) by "frau dulently depriv[ing] them of their workers[']compensation benefits through a series of predicate acts of racketeering activity involving mail and wire fraud."

The district court dismissed Plaintiffs' RICO claim against Liberty Mutual as reverse-preempted under the McCarran-Ferguson Act. As for the RICO claim against UPS, the district court held that: (1) Plaintiffs failed to plead any false statements or misrepresentations by UPS with particularity; and (2) Plaintiffs failed to present any

evidence that they detrimentally relied upon UPS's alleged misrepresentations.

Looking first to the issue of detrimental reliance, when mail and wire fraud are the predicate acts of a RICO claim, a plaintiff "cannot maintain a civil RICO claim...absent evidence that the defendants made misrepresentations or omissions of material facts to [the plaintiff] and evidence that [the plaintiff] relied on those misrepresentations or omissions to its detriment." *Cent. Distribs. Of Beer, Inc. V. Conn,* 5 F.3d 181, 184 (6 th Cir. 1993) (citing *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). Plaintiffs concede that "[t]his court has repeatedly held that a civil RICO plaintiff who alleges defendants committed a predicate act violating 18 U.S.C. §§ 1341 or 1343 must allege a claim for common law fraud – that is, he detrimentally relied on a deception defendants made to him." Nevertheless, Plaintiffs make a variety of arguments for overturning this precedent and requiring a plaintiff to show only a misrepresentation to a third party that proximately injured the plaintiff.

Most of Plaintiffs' arguments invite this panel to revisit the reliance requirement enunciated in *Bender* and reaffirmed repeatedly since that time.

> This, we are forbidden to do. In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.

United Sates v Washington, 127 F.3d 510, 517 (6th Cir. 1997) (citations and internal quotations omitted). To the extent Plaintiffs argue that the Supreme Court decisions in *Neder v. United States*, 527 U.S. 1 (q999), and *Sedima, S.P.R.L. V. Imrex Co.*, 473 U.S. 479 (1985), affect the rule set out in *Bender*, that argument has been explicitly rejected in an unpublished decision of this court, *see Chaz Constr., LLC v. Codell*, 137 Fed. App'x. 735, 739 (6th Cir. 2005), and implicitly rejected in a published decision, *see VanDenBroeck v CommonPoint Mortgage Co.*, 210 F .3d 696, 701 (6th Cir. 2000) (reaffirming the requirement that plaintiffs must show reliance after both Sedima and Neder were decided).

Alternatively, Plaintiffs argue that, even should *Bender* remain the law of the circuit, their complaint sufficiently pled reliance and therefore the district court's dismissal of their complaint was in error. However, the only showing of reliance that the Plaintiffs point to in their brief is the following statement:[1]

> Defendants' fraud directly caused injury to Sherri Yax because it deprived her of workers compensation benefits and because it caused her the expense of paying attorney fees and her own milage to and from medical care. Plaintiff relied on the communication to the extent she suffered the financial loss of having to pay attorney fees and medical milage.

This showing is not enough because " the plaintiffs'

---

1 Similar statements were contained in the second amended complaint with respect to Plaintiffs Traynor and Dzagulones.

complaint does not allege what misrepresentations (or omissions) of material fact [UPS] made to the plaintiffs that they reasonably relied upon to their detriment." *Bender*, 749 F.2d at 1216 (citation omitted). Accepting everything Plaintiffs state as true, they did not detrimentally rely upon any statements contained within the notices of dispute filed on UPS' s behalf by Liberty Mutual. What Plaintiffs characterize as reliance upon the statements contained in the notices [payment of various expenses and deprivation of benefits] are, in reality, nothing more than consequences flowing from Defendants' decision to contest Plaintiffs' workers' compensation benefits in each case.

Because of Plaintiffs failure to plead a necessary element of their RICO claim against UPS, we need not reach the district court's alternative ground of dismissal – that Plaintiffs had not pled false statements with particularity. Moreover, we likewise need not reach the McCarran-Ferguson Act issue regarding Liberty Mutual. Since Plaintiffs' RICO claim against Liberty Mutual was based upon the same factual scenario as the RICO claim against UPS, their failure to plead detrimental reliance in their claim against UPS dooms their RICO claim against Liberty Mutual as well.

B. IIED Claim

Plaintiffs also appeal the district court's dismissal of their IIED claims against UPS. The district court dismissed these claims pursuant to Fed. R. Civ.P.12 on the ground that Plaintiffs were not entitled to leave to amend their complaint to allege IIED. Alternatively, the district court held that Plaintiffs' IIED claims failed as a matter of law since "[n]othing described by the Plaintiffs rises to the level of sufficiently outrageous conduct."

We need not decide whether the district court abused its discretion in refusing to allow Plaintiffs leave to amend their complaint or whether the district court's conclusion that Plaintiffs' IIED claim failed as a matter of law was correct. Instead, we need only look to the issue of supplemental jurisdiction over Plaintiffs' state law IIED claim. A federal court that has dismissed a plaintiff's federal law claims should not ordinarily reach the plaintiff's state law claims. *See* 28 U.S.C. § 1367(c)(3); *United Mine Workers of Am. V. Gibbs*, 383 U.S. 715, 726 (q966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.") Supplemental jurisdiction should be exercised only in cases where the "interest of judicial economy and the avoidance of multiplicity of litigation" outweigh our concern over "needlessly deciding state law issues." *Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1983) (citation omitted). We review a district court's decision to exercise supplemental jurisdiction for abuse of discretion. *Id.*

Assuming that the district court's alternative holding on the IIED claims constituted an exercise of supplemental jurisdiction, the district court should have dismissed the IIED claims *without* prejudice. Plaintiffs' IIED claims have no bearing on their RICO claims. Moreover, the district court pointed to no overwhelming issues of judicial economy justifying the exercise of supplemental jurisdiction. On the whole, this appears to be the ordinary case in which a federal court would be "needlessly deciding state law issues." *Id.* We will remand the IIED claims for dismissal without prejudice.

The judgment is AFFIRMED as to all claims, except the IIED claims. We REVERSE the dismissal with prejudice of the IIED claims and REMAND for the district court to dismiss the IIED claims without prejudice.

DATED: AUG 24 2006

UNITED STATES DISTRICT COURT
EASTER DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRI YAX, BRYAN TRAYNOR,
and PATRICK DZAGULONES,

Plaintiffs,

Case No. 03-72106
v. HONORABLE DENISE PAGE HOOD

UNITED PARCEL SERVICE and
LIBERTY MUTUAL INSURANCE CO.,

Defendants.

MEMORANDUM OPINION & ORDER GRANTING DEFENDANT UNITED PARCEL SERVICE'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

[May 27, 2005]

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs assert their worker's compensation benefits were wrongfully terminated and brought suit on May 29, 2003, pursuant to the federal Racketeer Influence and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961, et seq., and the Worker's Disability Compensation of Act or 1969 under M.C.L. §418.101, et seq. Plaintiffs alleged violations of RICO, wrongful denial of benefits Complaint of June 17, 2003, adding a party.

On July 25, 2003, Defendants filed a Motion to

Dismiss. In addition to responding to Defendants' Motion, Plaintiffs filed a separate Motion to Amend on October 30, 2003 After conducting a hearing on both Motions, the Court issued an Order on March 31, 2004. In its Memorandum Opinion & order Re: Defendants, United Parcel Service's, & Liberty Mutual Insurance Company's, Motion to Dismiss & Plaintiffs' Motion to Amend Complaint, The Court (1) dismissed Count II of Plaintiffs' Complaint, alleging wrongful termination of benefits against Defendant UPS; (2) dismissed Count III, retaliation, against Defendant UPS; (3) dismissed Count I, RICO, against Defendant UPS pending amendment by Plaintiffs; (4) dismissed Counts I, II, and III against Defendant Liberty Mutual; (5) dismissed Defendant Liberty Mutual from the case entirely; (6) granted Plaintiff' Motion to Amend as to Count I against UPS only; and (7) denied Plaintiffs' Motion to Amend entirely with respect to Defendant Liberty Mutual. (Mar. 31, 2004 Mem. Op. & Ord. At 25-26.) The Court specified, "Plaintiff's RICO claim must fail absent amendment of the Complaint." (Id. At 15.) Despite this threshold deficiency, the Court went on the analyze Plaintiffs' RICO claim. The Court concluded, "[s]in ce Plaintiffs' Complaint not only does not demonstrate reliance, but doesn't indicate that any of the alleged fraudulent communications were communicated directly indirectly to the Plaintiffs, Plaintiffs' RICO cause of action must fail absent amendment of the Complaint." (Id. At 19.)

On April 23, 2004, Plaintiffs filed their Second Amended Complaint against both Defendant UPS and Defendant Liberty Mutual. Plaintiffs assert a RICO claim against Defendant UPS, and an Intentional Infliction of Emotional Distress (" IIED") claim against both Defendants.

This mater is before the Court on Defendant UPS" Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) or Alternatively to Stay Proceedings, filed May 4, 2004. Defendant Liberty Mutual filed a Notice of Concurrence in Defendant UPS' Motion on May 26, 2004. Defendant

UPS' Motion to Dismiss claims Plaintiffs: (1) failed to allege a fraudulent statement; (2) cannot establish proximate cause under 'RICO ; and (3) cannot support a claim for IIED. Plaintiffs filed their Response on May 25, 2004, to which Defendant UPS replied on June 9, 2004. For the reasons set forth below, the Court grants Defendant UPS' Motion to Dismiss.

II. STATEMENT OF FACTS

Plaintiff Yax received worker's compensation benefits for an alleged pre-existing back injury from October 2001 through September 2002. Plaintiff Yax alleges Defendant Liberty Mutual completed a Notice of Dispute and submitted it to the Michigan Worker's Compensation Bureau on September 17, 2002. (2d Am. Compl. At 10.) The Notice of Dispute lists the alleged reason for dispute as "[n]o medical evidence of continued disability." (Id.) Plaintiff Yax alleges this Notice was fraudulent because Defendant Liberty Mutual possessed reports from multiple doctors stating Plaintiff Yax was indeed disabled. (Id.) Plaintiff Yax further alleges Defendant UPS acted in concert with Defendant Liberty Mutual, and alleges Defendant Liberty Mutual was Defendant UPS' agent during this process. (Id.)

Plaintiff Traynor was employed with Defendant UPS loading trucks. Plaintiff Traynor received worker's compensation benefits from August 20, 2002 until March 12, 2003, for a disabling back injury. In the Second Amended Complaint, Plaintiff Traynor claims Defendant Liberty Mutual provided a Notice of Dispute to the Michigan Worker's Compensation Bureau on March 12, 2003. (Id. At 20.) Plaintiff Traynor alleges this Notice was fraudulent because the stated basis fro dispute was 'the 2/3/03 Dr. W. Higginbotham IME." (Id.) Plaintiff Traynor further alleges that "Dr. Higginbotham's report did not give Liberty any basis for termination of benefits." (Id.) Plaintiff Traynor concludes Defendant UPS was "informed of the decision of]Defendant] Liberty [Mutual], and

approved them or let them stand." (Id.) Plaintiff "Traynor also claims Defendant Liberty Mutual acted as an agent for Defendant UPS.

Plaintiff Dzagulones was employed as a UPS driver. Plaintiff Dzagulones claims he sustained nerve damage in his arm due to lifting boxes in September 199. Plaintiff Dzagulones received worker's compensation benefits from November 199 until June 2003. Plaintiff Dzagulones also points to an allegedly fraudulent Notice of Dispute filed by Defendant Liberty Mutual on March 13, 2002. (Id. At 29.) The Notice stated Defendant Liberty Mutual was "[d]isputing it based on 5/28/02 IME." (Id.) Plaintiff alleges the May 28, 2002 IME report "was false and the product of a conspiracy with defendant [UPS] and its agent Liberty Mutual to wrongfully deprive plaintiff and others of their benefits." (Id.)

III. STANDARD OF REVIEW

The Sixth Circuit held in *Windsor v. The Tennessean,* 719 F.2d 155 (6th Cir. 1983), that the standard of review "when evaluating a motion to dismiss brought pursuant to rule 12(b)(6), [is to regard] the factual allegations in the complaint...as true." Id. At 158 (quoting *Walker Process Equipment, Inc. V Food Machinery & Chemical Corp.* 382 U.S. 172, (1965)). The Windsor court went on to state, "[t]he claim should not be dismissed unless it appears beyond doubt that plaintiff can prove o set of facts in support of his claim which would entitle him to relief." Id. (Citing *Conley v Gibson,* 355 U.S. 71, 45-46 (1957)).

The standard of review under Federal Rule of Civil Procedure 12(b)(6) is liberal . "A complaint need not set down in detail all the particularities of plaintiff's claim, ' but must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir. 1994). It is plain that, although liberal , the standard does require a plaintiff to plead more than bare legal

conclusions. *See Morgan v Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987) (liberal Rule 12(b)(6) review is not afforded legal conclusions and unwarranted factual inferences); *Ana Leon T. V. Federal Reserve Bank*, 823 F.2d 928, 930 (6th Cir. F1987) (per curiam) (mere conclusions are not afford liberal Rule 12(b)(6) review). "In practice, a . . complaint must contain either direct or inferential allegations requesting all the material elements to sustain a recovery under some viable legal theory." *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993) (internal quotation marks omitted) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2e 434, 436 (6th Cir. 1988)).

The district court must construe the complaint I a light most favorable to the Plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Allard,* 991 F.2d at 1240; *Mayer v. Mylod,* 988 F.2d 635, 638 (6th Cir. 1993). When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor. *Allard,* 991 F.2d at 1240; *Mayer,* 988 F.2d at 638. Hence, a judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations. *Allard,* 991 F.2d at 1240; *Lawler v Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990)

IV. APPLICABLE LAW & ANALYSIS

A. Amendment of Plaintiffs' Complaint

[this portion is omitted from this appendix]

B. "Revised Second Amended Complaint"

[this portion is omitted from this appendix]

C. RICO

A violation of 18 U.S.C. § 1962(c), the provision of RICO upon which Plaintiffs rely to support their claim,

consists of the following elements; "(1) conduct (2) of an enterprise (3) through a patern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 (1985). "Racketeering activity' is defined in 18 U.S.C. § 1961 (1)(B) as including any act 'indict able' under certain enumerated federal criminal statutes, including 18 U.S.C. § 1341, which makes mail fraud a criminal offense, and 18 U.S.C. § 1343, which makes wire fraud a crime." *Schreiber Distributing Co. V. Serv-Well Furniture Co.,* 806 F.2e 1393, 1399 (9th Cir. 1986)

To maintain their RICO action, Plaintiffs must show that each element of mail fraud or wire fraud has been committed by Defendants. "To allege a violation of the mail fraud statute, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Schreiber,* 806 F.2d at f1399-1400. "Similarly, a wire fraud violations [sic] consists of (1) the formation of a scheme or artifice to defraud (2) use of the United State wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Id.* At q400. Plaintiffs cannot maintain a civil RICO claim against Defendants absent evidence that Defendants made misrepresentations or omissions of material fact to Plaintiffs, and evidence that Plaintiffs relied on those misrepresentations or omissions of material fact to Plaintiffs, and evidence that Plaintiffs relied on those misrepresentations or omissions to their detriment. *See Bender v. Southland Corp.,* 749 F.2d 1205, f1216 (6th Cir. 1984). *See also Blount Financial Svcs., Inc. V. Walter E. Heller & Co.,* 819 F.2d 151, 152 (6th Cir. 1987) (holding that the plaintiff must plead with particularity the false statements of fact made by the defendants to the plaintiffs and the facts showing that the plaintiff relied on those statements to its detriment); *Schreiber,* 806 F.2e at 1400 (noting that the plaintiff properly pleaded that the defendants had made misrepresentations to the plaintiff

and that the plaintiff had detrimentally relied on those statements). The defendant must make a false statement or omission of fact to the plaintiff to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim.

"In order to establish 'racketeering activity' Plaintiffs must allege a predicate act," under 18 U.S.C. § 1961(1). *Kenty v. Bank One, Columbus,* N. A. 92 F.3e 834, 389 (6th Cir. 1996). Plaintiffs alleged mail and wire fraud. Rule 9(b) of the Federal Rules of Civil Procedure provides that in a complaint alleging fraud, "the circumstances constituting fraud...shall be stated with particularity." Fed. R. Civ. P. 9(b). The purpose of Rule 9(b) is to provide fair notice to the defendant so as to allow him to prepare an informed pleading responsive to the specific allegations of fraud. *Michaels Bldg. Co. V. Ameritrust Co.,* N.A., 848 F.2d 674, 679 (6th Cir. 1988). The Sixth Circuit reads the requirement of Rule 9(b) "liberally,...requiring a plaintiff, at a minimum, to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.," *Coffey v. Foamex L.P.,* 2 F.3d 157, 161-162 (6th Cir. 1993) (internal quotation marks and citation omitted).

This liberal reading stems from the influence of Rule 8, which "requires a 'sho rt and pain statement of the claim,' and calls for 'simple, concise, and direct' allegations." *See id.; Michaels Bldg. Co.,* 848 F.2d at 679 (quoting Fed. R. Civ. P. 8(a), (e). Even against the Rule 8 "backdrop admonition of simplicity in pleading," *id.*, "allegations of fraudulent misrepresentation[s] must be made with sufficient particularity and with a sufficient factual basis to support an inference that they were knowingly made." *Coffey,* 2 F.3d at 162 (internal quotation marks and citation omitted).

As a preliminary matter, Plaintiffs' RICO claim against Defendant Liberty Mutual is not allowed , as per the Courts March 31, 2004 Order. With respect to Defendant UPS, Plaintiffs show no alleged false statements with time, place, and content. Plaintiff Yax's benefits were

terminated due tot he determination that no medical evidence of a continued disability existed. This statement is not false, as Defendants did terminate Plaintiff Yax's benefits and claimed it was based on no medical evidence of continued disability. Plaintiff Traynor claims fraud based on the Notice of Dispute filed and Dr. Higginbotham's IME report. Plaintiff Traynor cannot demonstrate falsehood because Defendant UPS did dispute the temporary total disability based on Dr. Higginbotham's IME report. Plaintiff Traynor cannot demonstrate falsehood because Defendant UPS did dispute the temporary total disability based on Dr. Higginbotham's IME report. Plaintiff Dzagulones' claims suffer from the same failing: Defendant UPS did dispute the temporary total disability based on the doctor's report. Plaintiff Dzagulones also alleges Defendants conspired to produce a deliberately misrepresented IME report, but he presents no evidence supporting the existence of the alleged conspiracy. A bare allegation of falsity is not enough to sustain a claim in the face of a Rule 12(b)(6) motion; nor can a bare allegation of conspiracy survive a motion to dismiss.

Plaintiffs fail to show Defendants' statements were intended to mislead Plaintiffs. Defendants claim the statements were made to the Worker's Compensation Board, and only "incidentally" to Plaintiffs. Because they were not aimed directly at Plaintiffs, Defendants argue the statements could not have been intended to mislead Plaintiffs. Plaintiffs argue that the Court cannot examine the intent of Defendant UPS in a Rule 12(b)(6) motion, and must instead accept Plaintiffs' allegations of intent to mislead as true. However, the only reason IMEs are taken and reports sent to the Worker's Compensation Board is to allow the Board to make a decision about disability payments. Information about the disputes and the IMEs was not provided to mislead Plaintiffs but to put them on notice of Defendant UPS disputing their disability and giving Defendant UPS' reason for dispute: the IME reports of no disability. The truthfulness of the IME reports was a question of fact previously determined by the Worker's

Compensation Board.

Defendants' alleged misrepresentations cannot be demonstrated to have been intended for Plaintiffs' reliance–to induce them to part with their worker's compensation rights. The statements may have been a scheme perpetrated on the Worker's Compensation Board to deny further benefits, but the statements cannot be said to have been directed to induce Plaintiffs to give up their worker's compensation rights, as the filing of the Notice of Dispute of worker's compensation disability by Defendant UPS demonstrates.

With respect to proximate cause and justifiable reliance, Plaintiffs claim reliance in theat they paid their own medical bills which Defendants would have paid as well as hiring an attorney to obtain their benefits. I the alternative , Plaintiffs claim their Complaint is properly pled and that they are not required to prove justifiable reliance under 18 U.S.C. § 1512. The Court finds Plaintiffs must necessarily prove justifiable reliance because they must demonstrate predicate acts as an element of their claim.

Plaintiffs argue in favor of invoking Federal ?rule of Civil Procedure Rule 11 (b)(3), regarding the use of mail or wire merely as a tool for achievement of fraud, to make Rule 9 (b) inapplicable in this instance. Plaintiffs cite *Rotella v. Wood,* 528 U.S. 549 (2000), in support of this proposition. In *Rotella*, the Supreme Court considered whether the accrual of a patient's RICO action was delayed until he actually discovered the alleged patern of racketeering activity. The Court held accrual of such an action is not delayed; the relevant claims period begins to run from the time the plaintiff discovers the injury. *Id.* at 558-59. Rotella also held that "while we assume the Rule 9(b) will exact some cost" on plaintiff, enforcing Rule 9(b) in its most stringent form "ignores the flexibility provided by rule 11(b)(3), allowing pleadings based on evidence *reasonably anticipated* after further investigation or discovery." Id. At 560 (emphasis added). Plaintiff's cannot show a reasonable anticipation of evidence

supporting their claims following based on pure speculation alone. While rotella notes the interplay between Rule 9 and Rule 11, it does not eliminate the standards of Rule 9 (b). Even with a reduced burden, Plaintiffs cannot survive dismissal of their claims.

Plaintiffs also assert rule 9(b) is inapplicable where the allegedly fraudulent communications are in the hands of Defendants. In support of this contention, Plaintiffs rely on *Abels v Farmers Commodities Corp.* 259 F.3d 910 (8th Cir. 2001). Notwithstanding whether Abels is applicable under Sixth Circuit precedent, see Mar. 30 em. Op. & ord. At 12 (describing Sixth Circuit Pleading requirements), the Court finds Abels is distinguishable from the present matter in at lease two respects. First, the plaintiffs in Abels actually pled particularized fraudulent communications is their complaint. The same cannot be said of Plaintiffs in any of their various pleadings submitted to the Court. Second, Plaintiffs have already gone through the worker's compensation process. Abels does not provide Plaintiffs with ability to meet the requirements of Rule 9 (b).

The Court believes Plaintiffs present a circular argument since they allege the fraud was the submissions to the Worker' s Compensation Board and to themselves. Alternatively, the alleged scheme to defraud was the communication via medical reports between Defendants ad the doctors. Yet Plaintiffs in fact claim Defendants provided false and is leading information to the Worker's Compensation board. Plaintiffs have not delineated "with adequate particularity in the body of the complaint, the specific circumstance constituting the overall fraudulent scheme." (Pls.' Resp. At 15.)

D. IIED

[this portion is omitted from Appendix]

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is granted.

Accordingly,

IT IS ORDERED that Defendant UPS' Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) or Alternatively to Stay Proceedings **[Docket o. 27, filed May 4, 2004]** is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Second Amended Complaint is DISMISSED with prejudice.

DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DATED: MAY 27, 2005

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRI YAX, BRYAN TRAYNOR,
HEIDI WALLACE, DANIEL HOLCOMB,
and PATRICK DZAGULONES,

Plaintiffs,

Civil Action No: 03-CV-72106
HONORABLE DENISE PAGE HOOD
MAGISTRATE JUDGE WALLACE CAPEL, JR.

UNITED PARCEL SERVICE and
LIBERTY MUTUAL INSURANCE
COMPANY, foreign corporations,

Defendants.

MEMORANDUM OPINION & ORDER RE:
DEFENDANTS',
UNITED PARCEL SERVICE'S, & LIBERTY MUTUAL
INSURANCE COMPANY'S,
MOTION TO DISMISS & PLAINTIFFS' MOTION TO
AMEND COMPLAINT
[March 31, 2004]
[Not Reproduced in Full in this Appendix]

I. Introduction

This matter is before the Court on Defendant's, United Parcel Service's (UPS), Motion to Dismiss pursuant to Fed. R. Civ. P. 12 (b) (6). Plaintiffs assert that their worker's compensation benefits were wrongfully terminated and bring their cause of action pursuant to the federal Racketeer Influence and Corrupt Organization Act (RICO) under 18 U.S.C. § 1961, et. seq. and pursuant to the Worker's Disability Compensation Act of 1969 under M.C.L. §418.101, et. seq. Defendant UPS asserts that Plaintiffs

cause of action should be dismissed for several reasons. First Defendant UPS asserts that Plaintiff's RICO claim fails to state a claim upon which relief can be granted because the Complaint is not pled with particularity and there are no allegations of reliance. Second, it is alleged that Plaintiff's RICO claim is barred by the McCarran-Ferguson Act. Third, Defendant UPS contends that all of Plaintiff's claims are barred by the Doctrine of Primary Jurisdiction. Fourth, Defendant UPS claims that Plaintiffs count entitled "Wrongful Termination of Benefits" is not a cognizable cause of action. Finally, Defendant UPS asserts that there are no allegations of retaliation in Plaintiffs' Complaint which are necessary in order to bring a viable worker's compensation cause of action.

Defendant Liberty Mutual Insurance (LMI) filed its Motion of Concurrence with Defendant UPS' Motion to Dismiss. Plaintiffs filed their response' to Defendant UPS' Motion to Dismiss. Defendant UPS filed its reply; and Plaintiff filed a supplemental reply brief. Plaintiffs subsequently filed a Motion to Amend Complaint to which Defendants filed their response.

II. Statement of Facts

There are five Plaintiffs, each with a different set of facts. Plaintiff Yax was receiving worker's compensation benefits for an alleged pre-existing back injury beginning in October 2001. However, Defendant LMI filed a Notice of Dispute; and in September 2002, Plaintiff Yax ceased receiving worker's compensation benefits. Plaintiff Yax alleges that Defendant LMI's actions were fraudulent and that Defendants LMI and UPS conspired to fraudulently terminate her worker's compensation benefits.

Plaintiff Traynor was employed with Defendant UPS loading the trucks and also received worker's compensation benefits from August 20, 2002 until March 12, 2003, for a disabling back injury. Plaintiff Traynor's benefits ceased after Defendant LMI disputed his right to receive continued benefits. Plaintiff Traynor also claims that Defendants LMI

and UPS conspired to fraudulently deny him worker's compensation benefits.

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1 Although the pleading is a response, it is entitled "Plaintiff's *Reply* to UPS' Motion to Dismiss Pursuant to FRCP 12(b)(6). *(emphasis added)*

Plaintiff Holcomb drove trucks for Defendant UPS and sustained nerve damage in his arm as a result of lifting boxes in October 1993. Plaintiff Holcomb received worker's compensation benefits for several years until he was examined in March 2003, at which time the physician found that he was no longer disabled. As a result of the physician's diagnosis, Plaintiff Holcomb's worker's compensation benefits stopped. Plaintiff Holcomb alleges that the physician's opinion was tainted by Defendants LMI and UPS as part of the conspiracy to fraudulently deprive Plaintiff Holcomb of worker's compensation benefits.

Plaintiff Wallace was employed with Defendant UPS as a part-time clerk and claims that in October 2002, she sustained a shoulder injury while lifting a heavy box. As a result, Plaintiff Wallace began to receive worker's compensation benefits. Plaintiff Wallace's allegations are as follows:

> Both before and after her injury, Heidi Wallace was training at her own expense to become a medical assistant. Upon completion of her course and placement in a job, she would have earned more money than she was making at UPS, which would have ended UPS' obligation to pay worker's compensation wage loss benefits. This fact was known to defendants. Nevertheless defendant insisted she seek full-time work under the guidance of Sharon Murphy of Brown Rehabilitation Services. Plaintiff did so. However, plaintiff dressed casually for one meeting with Sharon Murphy, not knowing that Murphy wanted her to wear

> clothes which Murphy thought were more appropriate for going on a job interview. Because of this misunderstanding over clothes, Eric Bouler of Liberty's Indianapolis claims office terminated plaintiffs benefits.

(Plaintiffs First Amended Complaint, 1165, pp. 18-19). Plaintiff Wallace claims that Defendants LMI and UPS and Sharon Murphy conspired to deprive and defraud Plaintiff Wallace of her worker's compensation benefits.

Finally, Plaintiff Dzagulones, who was employed as a UPS driver, claims that he also sustained nerve damage in his arm due to lifting boxes in September 1999. Plaintiff Dzagulones received worker's compensation benefits from November 1999 until June 2003. Plaintiff Dzagulones asserts that his worker's compensation benefits were terminated after Defendant LMI received a supplemental medical report which stated that he had an "ongoing work related pathology." *(Plaintiffs First Amended Complaint,* 111180-81). Plaintiff Dzagulones alleges that Defendant offered to settle Plaintiffs claim for $70,000.00 as opposed to paying him benefits indefinitely. Plaintiff Dzagulones was allegedly given the choice of accepting the settlement or engaging in the dispute process. Plaintiff chose not to accept the settlement and claims that Defendants LMI and UPS conspired to fraudulently terminate his worker's compensation benefits.

III. Standard of Review

The Sixth Circuit held in *Windsor v. The Tennessean,* 719 F.2d 155 (6th Cir. 1983) that the standard of review "when evaluating a motion to dismiss brought pursuant to rule 12 (b) (6), [is to regard] the factual allegations in the complaint . . . as true." Id. at 158 *(quoting* Walker Process Equipment, *Inc.* v. *Food Machinery & Chemical* Corp., 382 U.S. 172, (1965)). The Windsor court went on to say that "[t]he claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him

to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The standard of review for dismissal of a complaint under Fed.R.Civ.P. 12 (b) (6) is liberal. "'A complaint need not set down in detail all the particularities of a plaintiffs claim,' but must simply `give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests.'"Gazette v. *City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir.1994). It is plain that, although liberal, the standard does require that a plaintiff plead more than bare legal conclusions. *See, Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir.1987) (liberal Rule 12 (b) (6) review is not afforded legal conclusions and unwarranted factual inferences) ; Ana Leon T. v. *Federal Reserve Bank,* 823 F.2d 928, 930 (6th Cir.) (per curiam) (mere conclusions are not afforded liberal Rule 12 (b) (6) review). "In practice, a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." Allard v. *Weitzman* (In re DeLorean Motor Co.) , 991 F.2d 1236, 1240 (6th Cir. 1993) (internal quotation marks omitted) *(quoting Scheid* v. Fanny Farmer *Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir.1988)).

The district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Allard,* 991 F.2d at 1240; *Mayer* v. *Mylod,* 988 F.2d 635, 638 (6 th Cir. 1993). When an allegation is capable of more than one inference, it must be construed in the plaintiffs favor. *Allard,* 991 F.2d at 1240; Mayer, 988 F.2d at 638. Hence, a judge may not grant a Rule 12 (b) (6) motion based on a disbelief of a complaint's factual allegations. Allard, 991 F.2d at 1240; *Lawler* v. *Marshall,* 898 F.2d 1196, 1199 (6th Cir.1990). N.

IV. Applicable Law &Analysis

A. Primary Jurisdiction
[this portion omitted from Appendix]

B. McCarran-Ferguson Act's Application
[this portion omitted from Appendix]

C. Plaintiff's RICO Claim

A violation of 18 U.S.C. § 1962(c), the provision of RICO upon which Plaintiffs rely to support their claim, consists of the following elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima,* S.P.R.L. *v.* Imrex Co., 473 U.S. 479, 496 1985). "'Racketeering activity' is defined in 18 U.S.C. § 1961(1) (B) as including any act 'indictable' under certain enumerated federal criminal statutes, including 18 U.S.C. § 1341, which makes mail fraud a criminal offense, and 18 U.S.C. § 1343, which makes wire fraud a crime." *Schreiber Distributing Co. v. Serv-Well Furniture* Co., 806 F.2d 1393, 1399 (9th Cir.1986).

To maintain their RICO action, Plaintiffs must show that each element of mail fraud or wire fraud has been committed by the Defendants. "To allege a violation of the mail fraud statute, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Schreiber,* 806 F.2d at 1399 - 1400. "Similarly, a wire fraud violations [sic] consists f (1) the formation of a scheme or artifice to defraud (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Id.* at 1400. Plaintiffs cannot maintain a civil RICO claim against these Defendants absent evidence that the Defendants made misrepresentations or omissions of material fact to the Plaintiffs and evidence that Plaintiffs relied on those misrepresentations or omissions to its detriment. *See Bender* v. *Southland* Corp., 749 F.2d 1205, 1216 (6th Cir.1984). *See also Blount Financial Svcs., Inc.* v.

Walter E. *Heller* & Co., 819 F.2d 151, 152 (6th Cir.1987) (holding that the plaintiff must plead with particularity the false statements of fact made by the defendants to the plaintiffs and the facts showing that the plaintiff relied on those statements to its detriment); *Schreiber,* 806 F.2d at 1400 (noting that the plaintiff properly pleaded that the defendants had made misrepresentations to the plaintiff and that the plaintiff had detrimentally relied on those statements). The defendant must make a false statement or omission of fact to the plaintiff to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim.

1. Racketeering Activity

I. Plead with Particularity

In order to establish 'racketeering activity' Plaintiffs must allege a predicate act," *Kenty v. Bank One, Columbus, N.A.,* 92 F.3d 384, 389 (6th Cir.1996), under 18 U.S.C. § 1961(1). Plaintiffs alleged mail and wire fraud. Rule 9 (b) of the Federal Rules of Civil Procedure provides that in a complaint alleging fraud, "the circumstances constituting fraud ... shall be stated with particularity." *Fed.R.Civ.P. 9 (b)* . The purpose of Rule 9(b) is to provide fair notice to the defendant so as to allow him to prepare an informed pleading responsive to the specific allegations of fraud. *Michaels Bldg.v Ameritruist Co.,* N.A., 848 F.2d 674, 679 (6th Cir.1988). The Sixth Circuit reads rule 9(b)'s requirement "liberally, ... requiring a plaintiff, at a minimum, to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Coffey v. Foamex L.P.,* 2 F.3d 157, 161- 62 (6th Cir. 1993) *(internal quotation* marks *and citation omitted)* . This liberal reading stems from the influence of Rule 8, which "requires a 'short and plain statement of the claim,' and calls for 'simple, concise, and direct' allegations." See *id.; Michaels Bldg. Co.,* 848 F.2d at 679 (quoting Fed.R.Civ.P. 8(a), (e)) .

Even against Rule 8's "backdrop admonition of simplicity in pleading," *id.,* " [h]owever, allegations of fraudulent misrepresentations] must be made with

sufficient particularity and with a sufficient factual basis to support an inference that they were knowingly made." *Coffey,* 2 F.3d at 162 (internal *quotation* marks and *citation omitted)* . The elements of mail and wire fraud are: (1) a scheme to defraud, and (2) use of the mails, or of an interstate electronic communication, respectively, in furtherance of the scheme. *United States* v. Brown, 147 F.3d 477, 483 (6` h Cir. 1998). A scheme to defraud consists of intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the designed end. To allege intentional fraud, there must be proof of misrepresentations or omissions which were reasonably calculated to deceive persons of ordinary prudence and comprehension. Thus, Plaintiffs in this matter must allege with particularity a false statement of fact made by the Defendants which the Plaintiffs relied on. *Kenty,* 92 F.3d at 389-90.

Plaintiffs' complaint avers that the Defendants fraudulently conspired to deny Plaintiffs worker's compensation benefits. No specific statements are alleged to have been said by any individuals that would substantiate Plaintiffs' claim. In fact no statements are alleged to have been said directly to Plaintiffs, but rather the allegation is that Defendants LMI and UPS conspired with each other, or conspired with physicians or conspired with anyone in a position to support Plaintiffs' claim that they were entitled to worker's compensation benefits in an effort to wrongfully terminate Plaintiffs' worker's compensation benefits.

Plaintiffs' response is two-fold. First they argue that the Complaint does point to specific individuals making fraudulent communications. Second, even if the Court were to find that Plaintiffs' pleadings are pled insufficiently to survive Defendant's Motion, *Rotella v. Wood,* 528 U.S. 549 (2000) allegedly stands for the proposition that the particularity requirements are to be relaxed in some RICO claims.

Upon reviewing Plaintiffs Complaint and Amended

Complaint, the Court finds that the Plaintiffs have failed to plead their RICO claim with particularity. Plaintiffs' Complaint contains alleged statements such as: "Liberty expressly or implied [ly] communicated to Dr. Desantis that it wanted her to write a report stating Daniel Holcomb was not disabled, and state that Mr. Holcomb has no nerve impairment measurable on an EMG/nerve conduction study" *"Plaintiffs Responsive Motion to Dismiss, pg. 15,* 1149) "Liberty's cut-off of benefits constituted fraudulent denial of benefits via mail and electronic communications." *Id.;* "UPS officials were informed of the actions and decisions of Liberty, and approved them or let them stand." *(Plaintiff s Responsive e* Motion to *Dismiss, pg. 12,* ¶29); "Liberty employed Desantis in many worker's compensation claims, expressly or impliedly communicating to her that it wanted her to write a report which it could use to deny benefits. *(Plaintiffs Responsive e Motion to Dismiss, pg. 13, IBS)* .

Although these communications are set forth in the Complaint, there is no particularity as to the time, place, or content of these communications. From the above set forth communications, it is alleged that someone from Defendant LMI communicated with certain named individuals some information that led the named individual to recommend the cessation of worker's compensation benefits. However, the Court does not find these communications to be 'particular' or specific as to time, place and content because it is not apparent to the Court what the communication entailed, when it was communicated and from whom the communication was given. The Court finds that Plaintiff's Complaint is not pled sufficiently to meet the 'particularity' requirement; and Plaintiffs' RICO claim must fail absent amendment of the Complaint. However, for the purpose of completeness, the Court will address the remainder of the RICO analysis.

2. Pattern of Racketeering Activity

Next, the Court turns to the substance of Plaintiffs Complaint to determine whether it sufficiently alleges a pattern of racketeering activity. Under Rule 12 (b) (6) all of

the factual allegations are accepted as true. According to 18 U.S.C. §19b1(5), a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . " The Supreme Court has added "flesh" to the meaning of pattern in two major cases: *Sedima,* S.P.R.L. *v.* Imrex Co., Inc., 473 U.S. 479 (1985); and *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229 (1989). Under *Sedima,* it is the "actor of continuity plus relationship which combines to produce a pattern." *Sedima,* 473 U.S. 479, 496 n. 14. The Court further examined the issue of "continuity plus relationship" in *H.J. Inc.,* where the Court held that "it is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them 'ordered' or 'arranged." H.J. Inc., 492 U.S. at 238. "Relationship" exists where the conduct in question "embraces criminal acts t hat have the same or similar purposes, results, participants, victims or methods of commission . . . and are not isolated events." H.J. *Inc.,* 492 U.S. at 240. "Continuity" is primarily a temporal concept. It refers to a "closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." H.J. Inc., 492 U.S. at 241.

Plaintiff's Complaint sets forth the situation of five different former employees of Defendant UPS as illustrated below:

Former *Employees*	*Date* of Injury	Date Benefits Began	Date Benefits Ended	Injury
Sherri Yax	pre-existing	app. 10/1/01	app. 9/17/02	back injury
Bryan Traynor-driver	8/20/02	app. 9/02	3/12/03	back injury
Heidi Wallace-clerk	10/22/02	app. 9/02	shoulder injury	
Daniel Holcomb-driver his arm	10/19/93	app. 11/93	app. 3/03	nerve damage in
Patrick Dzagulones-driver	9/29/9911/99	6/03	nerve damage in his arm	

This Circuit in *Fleischhauer* v. *Feltner,* 879 F.2d 1290 (6 th Cir.1989) has adopted what some have characterized as the "multi-factor test" for determining whether a pattern exists in a given case. Specifically, the court held that "kin determining whether the predicate acts

are sufficiently continuous and related ... [the following facts are relevant]: the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Feltner,* 879 F.2d at 1297 (quoting *Liquid Air Corp. V. Rogers,* 834 F.2d 1297, 1304 (7th cir.1987). Based upon a review of Plaintiff's Complaint and the applicable standard for establishing a pattern of racketeering activity, the Court finds that Plaintiffs' Complaint is sufficient in that regard.

3. Reliance

Defendant UPS argues that since Plaintiffs did not plead reliance in their Complaint (Plaintiffs relied upon Defendants UPS and LMI's misrepresentations which caused them injury), Plaintiffs' RICO claim must fail, as reliance is an element of a RICO cause of action. Plaintiffs contend that reliance is not an element of a RICO claim and therefore does not need to be pled in order for their claim to survive Defendant UPS' Motion to Dismiss. The Court finds that there is truth to both parties' arguments.

It is true that at common law a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud. Blount *Financial Services, Inc.* v. *Walter E. Heller and* Co., 819 F.2d 151, 152 (6th Cir.1987). However, RICO bases its own brand of civil liability simply on the commission of specified criminal acts--here, criminal fraud--so long as they comprise a "pattern of racketeering activity"; and criminal fraud under the federal statute does not require "reliance" by anyone: it *is* enough that the defendant sought to deceive, whether or not he succeeded. *See Neder v. United States,* 527 U.S. 1, 24 (1999) ("The common-law requirement[ ] of 'justifiable reliance' [has] no place in the federal fraud statutes."). *Neder* states:

> [T] he fraud statutes [do] not incorporate all the elements of common-law fraud. The common-law requirements of "justifiable reliance" and "damages," for example, plainly

have no place in the federal fraud statutes. See, e.g., United States v. Stewart, 872 F.2d 957, 960 (C.A.10 1989) (" [Under the mail fraud statute,] the government does not have to prove actual reliance upon the defendant's misrepresentations"); United States v. Rowe, 56 F.2d 747, 749 (C.A.2 1932) (L. Hand, J.) ("Civilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability")

Therefore, the element of 'reliance' is not necessary for Plaintiffs to plead or prove in to order to properly set forth a prima facie case regarding a RICO claim. However, Plaintiffs face another hurdle which does involve pleading reliance; and that is proximate causation.

It is settled that a RICO plaintiff must establish proximate causation *See Holmes v. Securities* Investor Prot. Corp., 503 U.S. 258, 265-66 (1992) (rejecting argument that plaintiff can recover merely by showing "but for" causation of plaintiffs injury as too expansive a reading of statute's "by reason of language); *Ocean* Energy II, *Inc.* v. *Alexander & Alexander, Inc.*, 868 F.2d 740, 744 (5th Cir. 1989) ("Rather than construing section 1964(c) as imposing an artificial distinction between direct and indirect injuries, we believe that *Sedima* 's caused by' and 'flow from' language instructs us to employ a traditional causation analysis in determining whether a RICO plaintiff has been injured `by reason of a section 1962 violation."). Proximate cause in RICO cases bears the same meaning as in any other type of case where proximate cause is an element. *See Holmes,* 503 U.S. at 268.

However, as noted above, "justifiable reliance" is more appropriately a part of the proximate cause analysis. *Summit Properties Inc. v. Hoechst Celanese* Corp., 214 F.3d at 558-59 (5th Cir. 2000) ("The question before us is whether a plaintiffs reliance on the predicate mail or wire fraud is necessary in order to establish proximate causation."). Although the mail and wire fraud crimes do not require reliance as an element of criminal prosecution, see *Neder* v.

United States, 527 U.S. 1, 24-25 (1999), in a RICO claim based on wire or mail fraud as a predicate act, the plaintiff must show that the particular misrepresentation constituting such fraud was directed at the Plaintiffs and that he relied on the misrepresentation. *See Summit Props.*, 214 F.3d at 559. *Andrews v. American Nat. Red Cross, Inc.*, 176 F.Supp.2d 673, 690(W.D.Tex.,2001). Therefore, although justifiable reliance is not necessary to establish predicate acts of mail and wire fraud, Plaintiffs must nonetheless establish justifiable reliance to satisfy a different element of his RICO claim, that of injury to plaintiffs business or property and proximate causation. After a plaintiff shows that defendant has violated section 1962, he must further show that the predicate act caused the injury for which plaintiff seeks recovery. *Feeley v. Whitman Corp.*, 65 F.Supp.2d 164, 174 (S.D.N.Y.,1999).

> RICO provides that "any person injured in his business or property by reason of a RICO violation may bring a civil action to recover treble damages." 18 U.S.C. § 1964(c). Courts have interpreted the phrase "by reason of' to require that there be a causal connection between the prohibited conduct and the plaintiffs injury. Where mail or wire fraud is the RICO predicate act, plaintiff must show justifiable reliance to establish causation.*Id.*

Although Plaintiffs prevail on their argument that 'reliance' is not a required element of a RICO claim, it is a necessary element to prove causation, which is a required element of a RICO action. Since Plaintiffs' Complaint not only does not demonstrate reliance, but does not indicate that any of the alleged fraudulent communications were communicated directly or indirectly to the Plaintiffs, Plaintiffs' RICO cause of action must fail absent amendment of the Complaint.

D. Wrongful Termination of Worker's Compensation Benefits

[this portion omitted from Appendix]

F. Plaintiffs' Motion to Amend
[This portion omitted from Appendix]

V. Conclusion

Based upon the foregoing, the Court finds that Defendants' Motion to Dismiss is GRANTED as to Defendant LMI and UPS. Plaintiffs' Motion to Amend Complaint is GRANTED as to UPS only, and DENIED as to LMI. Such amendment is to take place within 21 days from the date of this Order.

IT IS HEREBY ORDERED that Defendant's UPS' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b) (6) [Docket No: 9-1, filed July 25, 2003] is GRANTED as to Count II (Wrongful Termination of Benefits) and Count III (Retaliation) of Plaintiff's Amended Complaint.

IT IS FURTHER ORDERED that UPS' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12 (b) (6) [Docket No: 9-1, filed July 25, 2003] is GRANTED as to Count I (RICO), subject to Plaintiffs' amendment of their Amended Complaint within 21 days from the date of this Order.

IT IS FURTHER ORDERED that Defendant's Liberty Mutual Insurance's Concurrence in Motion by Defendant UPS to Dismiss Pursuant to Federal Rule of Civil Procedure 12 (b) (6) [Docket No: 10-1, filed August 8, 2003] is GRANTED as to Count I (RICO), Count II (Wrongful Termination of Benefits) and Count III (Retaliation) of Plaintiffs Amended Complaint and Liberty Mutual Insurance is DISMISSED.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Amend Complaint **[Docket No: 15, 1, filed October 30, 2003] is GRANTED** as to Count I (RICO) of Plaintiffs' Amended Complaint and only as against UPS, and that the amended Complaint must be filed with this Court within 21 days from the entry of this Order.

IT IS FURTHER ORDERED that the parties appear for a status conference on June 1, 2004 @3:30 p.m.

DENISE PAGE HOOD
UNITED STATES DISTRICT COURT JUDGE

DATE: MAR 3 1 2004

UNITED STATES DISTRICT COURT
EASTER DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERRI YAX, BRYAN TRYNOR,
and PATRICK DZAGULOUNES,

Plaintiffs,

Case No. 03-72106
v. HONORABLE DENISE PAGE HOOD

UNITED PARCEL SERVICE and
LIBERTY MUTUAL INSURANCE CO.,

Defendants.

JUDGMENT

In accordance with the Order entered this date, and the Court having entered an Order dismissing this matter.

Accordingly, judgment is entered in favor of Defendants and against Plaintiffs.

Approved:

DAVID J. WEAVER
CLERK OF THE COURT

By: _____
Deputy Clerk

_____
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DATED: May 27 2005
Detroit, Michigan

UNITED STATES DISTRICT COURT

IN THE EASTERN DISTRICT OF MICHIGAN

SHERRI YAX, BRIAN TRAYNOR,
and PATRICK DZAGULONES,

Case No.: 03-72106
Hon. Denise Page Hood

Magistrate Judge Wallace Capel, Jr

Plaintiffs,

v

UNITED PARCEL SERVICE
and LIBERTY MUTUAL
INSURANCE COMPANY,
foreign corporations,

Defendants.

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SECOND AMENDED COMPLAINT AND JURY DEMAND [not reproduced in full]

7. One or more of these persons committed extortion, attempted extortion, mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently terminating or denying benefits, or by fraudulently terminating benefits because a person refused to settle a claim for the amount offered by Liberty Mutual. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343, and in violation of MCL 750.280. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery. In particular:

a. On Sept. 17, 2002, Peggy Neukam of Liberty Mutual, Indianapolis, IN, acting as agent for and in concert with United Parcel Service, mailed via the Postal Service from Indianapolis, IN, to Sherri Yax, 5734 Arcola, Garden City, MI, a Notice of Dispute announcing that Liberty and UPS terminated the benefits of Sherri Yax for the reason "No medical evidence for continued disability." This statement was fraudulent because UPS and Liberty possessed multiple reports from multiple doctors stating Sherri Yax was disabled.

b. UPS approved and continued the termination of Sherri Yax's benefits after being told through counsel that medical reports stated she was disabled, and after being told through counsel that Liberty had denied benefits on the ground there was "no medical evidence for continued disability."

c. On March 13, 2003, Peggy Neukam of Liberty Mutual, Indianapolis, IN, acting as agent for and in concert with United Parcel Service, mailed via the Postal Service from Indianapolis, IN, mailed to Brian Traynor, 899 Woodland, Pontiac MI 48340, a Notice of Dispute, stating "D isputing ttd [temporary total disability] based on 2/3/03 Dr. W. Higginbotham IME." Dr. Higginbotham's report did not give Liberty any basis for termination of benefits, and in fact supported plaintiff's claim. The report stated Mr. Traynor's disability was due to symptomatic aggravation at work of a pre-existing condition, thus informing Liberty that plaintiff was disabled by a condition which was compensable under Michigan law. This cut-off of benefits by Liberty Mutual and United Parcel Service constituted fraudulent denial of benefits via mail and electronic communications.

d. On August 17, 2003, Peggy Neukam of Liberty Mutual, Indianapolis IN, acting as agent for and in concert with United Parcel Service, mailed via the Postal Service from Indianapolis, IN, to Heidi Wallace, 5842 Ogden, Detroit MI 48210, a Notice of Dispute stating "Disputing ongoing TTD benefits due to work avoidance." This communication to Heidi Wallace was false and fraudulent.

e. (i) With regard to the

following communications, plaintiff is unable to identify the date, employee or exact content of the communications. However, the allegation is based on information and belief, and is likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

(ii) Liberty expressly or implied communicated to Drs. Annette Desantis and Paul Drouillard that it wanted them to write reports stating Brian Traynor, Sherri Yax, Patrick Dzagulones and Daniel Holcomb were not disabled due to work-related injuries, regardless of the true circumstances. Liberty's actions violated 18 USC §1512. These communications were by mail and wire and are not in the possession of plaintiff but are in the possession of Liberty Mutual and or United Parcel Service.

(iii) In September 2001, Liberty retained Dr. Terry Weingarden to examine Daniel Holcomb. Dr. Weingarden had completely or substantially retired from the practice medicine, so that his sole income or the great bulk of his income came from doing examinations for insurance companies and self-insured employers, and from his ownership interest in a company which provided examinations for insurance companies and self-insured

employers. Liberty expressly or implied communicated to Dr. Weingarden that it wanted him to write a report stating that plaintiff did not have a work-related disability, and he wrote such a report. This report was false, according to the surgeon who had treated plaintiff for many years. Liberty acknowledged the falsity of the report by not terminating plaintiff's benefits even though under the Michigan Workers Disability Compensation Act, MCL 418.101 et seq, it could have cited the report as a ground for termination of benefits.

(iv) From November 1999 until June 9, 2003, Patrick Dzagulones was being paid workers compensation voluntarily by Liberty Mutual and UPS due to injury at work to his left arm. On April 22, 2003, Carmelo Deogracias of Liberty's Indianapolis, IN, office sent to Mr. Dzagulones at 3947 Jackson, Dearborn Heights, MI 48125, a letter via the USPS ordering Mr. Dzagulones to be examined by Dr. Annette Desantis. Annette Desantis wrote a report stating plaintiff was not disabled by a work related injury. Mr. Deogracias cut off benefits after receiving this report. Plaintiff called him to ask why his benefits were being terminated. In a June 13, 2003, phone call, between plaintiff's residence in Dearborn Heights, MI, and Liberty's office in Indianapolis, IN, Mr. Deogracias told

plaintiff, "You can either go through the dispute process or you can settle your claim. There is a $70,000 offer on the table." Mr. Deogracias implied that one reason for the cut-off of benefits was the multiple prior injuries and claims for workers compensation that plaintiff had had. Mr. Deogracias told plaintiff that he (plaintiff) had had 18 reported injuries at work for UPS, described to plaintiff many of these injuries, and said that UPS had spent over $7,000 on treating these injuries. He told plaintiff that Karen Vaughan of UPS approved what he was doing. Plaintiff refused to settle for the amount offered.

****

30. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical care and mileage to and from medical care. Plaintiff relied on the communication to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage.

UNITED STATES DISTRICT COURT

IN THE EASTERN DISTRICT OF MICHIGAN

SHERRI YAX, BRIAN TRAYNOR,
HEIDI WALLACE, DANIEL
HOLCOMB and
PATRICK DZAGULONES, Case No.: 03-72106
Hon. Denise Page Hood
Plaintiffs,
Magistrate Judge Wallace
Capel, Jr

v

UNITED PARCEL SERVICE
and LIBERTY MUTUAL
INSURANCE COMPANY, foreign corporations,

Defendants.
_____/

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_____/

FIRST AMENDED COMPLAINT AND JURY DEMAND [not reproduced in full]

JURISDICTION AND VENUE

1. Federal question jurisdiction is conferred by plaintiffs' claims under the Federal Racketeer Influence and Corrupt Organizations Act, 18 USC §1961 et seq (RICO). Diversity of citizenship jurisdiction is conferred by 28 USC §1332 (plaintiffs are citizens of Michigan,

defendants are citizens of other states, and the amounts in controversy exceed $75,000). Pendant jurisdiction of state claims is conferred by 28 USC §1367.

2. Venue is properly laid in the Federal District Court for the Eastern District of Michigan because plaintiffs reside in that district and defendants do business in person and through their agents and representatives in that district, in Wayne and Oakland Counties, Michigan.

PARTIES

3. Plaintiffs Sherri Yax, Brian Traynor, Heidi Wallace, Daniel Holcomb and Patrick Dzagulones reside within the jurisdiction of the court. They were or are employees of United Parcel Service. United Parcel Services (UPS) and Liberty Mutual Insurance Company are corporations domiciled outside Michigan.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

4. United Parcel Service employed each of the plaintiffs. It complied with its obligation to provide its Michigan employees Michigan workers disability compensation insurance by signing a contract of insurance with Liberty Mutual Insurance Company. However, on information and belief, the contract of insurance effectively and perhaps contractually made UPS a self-insured for all or most of its losses.

5. Liberty Mutual Insurance Company adjusted the workers compensation claims out of an office in Indianapolis, IN. On information and belief, UPS adjusted its claims out of its Livonia, Michigan office, such as through Greg Kelley or his successors..

6. Decisions regarding paying claims or terminating payment were made jointly by UPS and Liberty Mutual, or were made by Liberty Mutual after consulting with UPS, or were ratified by UPS after being made by Liberty. These allegations are based on information and belief, and are likely to have evidentiary

support after a reasonable opportunity for investigation and discovery. The persons with decision power at UPS and Liberty Mutual formed an "enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO). Karen Vaughn and or Greg Kelley were or may have been the persons at UPS who made decisions with the personnel at Liberty.

7. One or more of these persons committed extortion, attempted extortion, mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently terminating or denying benefits, or by fraudulently terminating benefits because a person refused to settle a claim for the amount offered by Liberty Mutual. This fraud was accomplished by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343, and in violation of MCL 750.280. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery. In particular:

a. Liberty mailed via the Postal Service a Notice of Dispute announcing that it terminated the benefits of Sherri Yax for the reason "n o medical evidence for continued disability." This statement was fraudulent because defendant possessed multiple reports from multiple doctors stating plaintiff was disabled.

b. UPS approved and continued the termination of Sherri Yax's benefits after being told through counsel that medical reports stated she was disabled, and after being told through counsel that Liberty had denied benefits on the ground there was "no

> medical evidence for continued disability."

[rest of para. 7 and para 8 are omitted from Appendix]

COMPLAINT OF SHERRI YAX - FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

9. In late 2001 and in 2002, Liberty Mutual received reports from not one but three physicians, Drs. David Carr, Phillip Friedman and Dale Hoekstra, each saying that plaintiff remained disabled from her job because of lumbosacral symptoms and pathology. These reports indicated that plaintiff's disabling symptoms and or pathology were caused or at least partly caused (aggravated) by work Because plaintiff's disability was partly caused by work, it was fully compensable under the Michigan Workers Disability Compensation Act, MCL 418.101 et seq..

10. (A) In particular, on October 1, 2001, Dr. Phillip Friedman, board-certified neurosurgeon, reported to Liberty Mutual, and through it to UPS:

> Sherri appears to have symptoms of nerve root irritation related to Grade I spondylolisthesis and some disc protrusion. She has failed a trial of physical therapy.
>
> Because of the underlying spondylolisthesis, I believe even if she recovers she may be a risk for additional recurrences of pain in the future. I have stressed to her that the underlying pathology, ie, spondyloslisthesis, was not work-related, although work activities precipitated the symptoms.

(B) In particular, on Feb. 28, 2002, Dr. David Carr reported to Liberty Mutual:

Diagnostic studies have shown a developmental spondylolisthesis of a mild degree at the L5-S1 level. The MRI scan showed a disc protrusion toward the right side.

It is my opinion that the spondylolisthesis and the associated degenerative changes at that level are due to developmental factors with the impact of additional wear and tear based simply on the existing pathology and the passage of time. I do not identify any signs or Based on her complaints it is probable that the disc herniation at L5-S1 developed relative to those work activities.

At this time, I would recommend that she consider surgical intervention, if she refuses any additional attempts at injections in her low back and physical therapy has not helped. The surgery would include discectomy with nerve root decompression, which would relate to the work activities of August 2001. Any fusion done at that level, however, would address pre-existing developmental and non work-related pathology, which in my opinion did not increase or change relative to the work activities of August 2001.

It is anticipated that she could return to work, possibly with some restrictions within three to six months following the surgery if fusion is done, and within six to twelve weeks if only a discectomy is done.

On April 2, 2002, Dr. Carr wrote to defendants:

Based on her normal neurologic examination on 2/28/02, it would be my opinion that surgical intervention would address non-work related pathology relative to the spondylolisthesis (therefore a fusion would address non-work-related pathology) and any disc removal would address, by history, a

work-related condition.
In my opinion, Ms. Yax is able to work full time with a sit/stand/walk option, no repetitive bending or twisting, and no lifting or carrying over 10 pounds. These restrictions are applied, in part, for a work-related condition. These restrictions would be appropriate until she has her surgery.

11. UPS never provided plaintiff restricted work, and therefore plaintiff remained off work and defendants continued to pay workers disability compensation benefits.

12. On September 17, 2002, Liberty Mutual filed a Notice of Dispute with the Michigan Bureau of Workers Disability Compensation, stating "No medical evidence for continued disability." Pursuant to this Notice of Dispute, Liberty ceased paying workers compensation benefits.

13. At the time Liberty filed the notice of dispute, it possessed multiple medical reports stating plaintiff continued to be disabled. These reports were also in the possession of the workers compensation claims officials at UPS. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

COUNT I BY SHERRI YAX - RICO ALLEGATIONS

14. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. Plaintiff incorporates pars. 4 through 13.

15. Defendants' workers compensation officials formed an "enterprise" within the meaning of the RICO Act, which engaged in a pattern of racketeering aimed at fraudulently denying workers compensation benefits to the UPS employees in this suit, or fraudulently terminating

those benefits.

16. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

17. The predicate acts against plaintiff and her co-plaintiffs are described above in paragraph 7 -14.

18. Defendants' violation of RICO caused plaintiff to be wrongfully deprived of Michigan workers compensation benefits.

WHEREFORE Sherri Yax demands judgment against defendants for damages measured by the amount of benefits improperly withheld from her, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

COUNT II BY SHERRI YAX - WRONGFUL TERMINATION OF BENEFITS

19. Liberty mailed via the Postal Service a Notice of Dispute announcing that it terminated the benefits of Sherri Yax giving the reason "no medical evidence for continued disability." This statement was fraudulent because defendant possessed multiple reports from multiple doctors stating plaintiff was disabled. UPS approved and continued the termination of Sherri Yax's benefits after being told through counsel that it possessed specific reports stating she was disabled, and that its agent, Liberty had denied benefits on the ground that it had no medical evidence for continued disability. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and

discovery. Plaintiff incorporates pars. 4 through 13.

20. Plaintiff suffered emotional distress, pain, suffering, mental anguish and lack of medical care due to defendants' fraudulent termination of benefits.

21. Defendants' actions give rise to a cause of action recognized at common law by the Michigan courts in *Broaddus v Ferndale Fastener Division,* 84 Mich App 593, 269 NW2d 689 (1978), and *Atkinson v Farley,* 171 Mich App 784, 431 NW2d 95 (1988).

22. Defendants' actions have caused damages exceeding $75,000.

WHEREFORE Sherri Yax prays for judgment against defendants in an amount exceeding $75,000, plus interest, costs and attorney fees.

COUNT III BY SHERRI YAX - VIOLATION OF MCL 418.301(11)

23. MCL 418.301(11) provides that " a person shall not... in any manner discriminate against an employee because the employee.... instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee... of a right afforded by this act."

24. Defendants violated that law by fraudulently terminating plaintiff's benefits as hereinbefore described, causing the damages described in the preceding counts.

WHEREFORE Sherri Yax prays for judgment against defendants in an amount exceeding $75,000, plus interest, costs and attorney fees.

COMPLAINT OF BRIAN TRAYNOR FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

25. Brian Traynor was employed by UPS in a job

which required repetitive lifting of boxes weighing up to 75 pounds, and repetitive bending and twisting. He did this strenuous job without any significant back problem. Before his employment with UPS, he played football, wrestling and baseball in high school for three years without problem. Then, on August 20, 2002, when he was thirty years old, he fell and injured his low back while loading a truck at work for UPS.

26. Plaintiff' s supervisors at UPS, Mike O'Donnell and Jerry Welch, for two days would not allow plaintiff to go to a clinic, although his back was bruised, cut and swollen.

27. Plaintiff was sent by UPS to treatment at its industrial clinic, Concentra Medical Center, and began to receive weekly workers compensation checks from Liberty Mutual. He continued to receive these payments until the last check, dated March 12, 2003.

28. At Liberty Mutual' s request, plaintiff was examined on December 12, 2002, by neurosurgeon Dr. Paul Croissant. He diagnosed chronic first degree spondylolisthesis, and advised Liberty Mutual that plaintiff needed surgery, which he was willing to do.

29. Plaintiff was again examined at Liberty' s request, this time by Dr. William Higginbotham, on Feb. 3, 2003. Dr. Higginbotham wrote to Liberty that plaintiff suffered at work an aggravation of an underlying condition. Liberty knew from this report that plaintiff was disabled by a condition which was compensable under Michigan law, yet on March 13, 2003, Liberty cut off benefits, stating it was disputing benefits "based on 2/3/03 Dr. Higginbotham IME". Liberty's cut-off of benefits constituted fraudulent denial of benefits via mail and electronic communications. UPS officials were informed of the actions and decisions of Liberty, and approved them or let them stand. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have

evidentiary support after a reasonable opportunity for further investigation and discovery.

30. On March 18, 2003, in a phone conversation, Liberty's adjuster told plaintiff that he was denying plaintiff's workers compensation benefits, and then offered to settle the case.

31. Dr. Paul Croissant – chosen by Liberty Mutual in December, 2002, to examine plaintiff – wrote to Liberty Mutual on March 20, 3002, "There is no question in my mind that, although he had chronic first degree spondylolisthesis, his severe and chronic pain began with the fall described in my original note. I am just shocked that his own company would deny him like this. As quickly as we get the authorization, we plan to proceed with the surgery." Despite receipt of this letter, defendants continued to refuse to authorize surgery.

***

NOTICE OF DISPUTE

Michigan Department of Labor & Economic Growth
Workers' Compensation Agency
P O Box 30016, Lansing, MI 48909

1. Social Security No.	2. Date of Injury	3. Employee Name (Last, First, MI)		
4. Employee Address (Street No. and Name)		5. City	6. State	7. Zip Code
8. Employer Name				9. Federal ID No.
10. Employer Street Address		11. City	12. State	13. Zip Code
14. Carrier or Self-Insured Name			15. NAIC or Self-Insured No.	16. Zip Code
17. Service Company/TPA Name (if applicable)			18. Service Co./TPA ID No.	19. Zip Code
20. Claim or File No.		21. County of Injury		22. County Code (if known)

23. Reason for Dispute

A. _____ Injury not work related
B. _____ Medical treatment not related to injury
C. _____ Further investigation required (please specify below)
D. _____ Additional information required from employee (please specify below)
E. _____ Vocational rehabilitation dispute only (please specify below)
F. _____ Other (please specify below)

Making a false or fraudulent statement for the purpose of obtaining or denying benefits can result in criminal or civil prosecution, or both, and denial of benefits.

Authority: Workers' Disability Compensation Act, R408.33 (1)
Compliance: Mandatory
Penalty: Workers' Disability Compensation Act, 418.831; 418.801; R408.33

This is to certify that a copy of this form has been mailed or given to the injured employee.

24. Preparer's Name (Please print)	25. Signature	26. Telephone No.	27. Date

NOTICE TO EMPLOYEE

By filing this form, your employer or its workers' compensation insurance company has indicated to the Workers' Compensation Agency that it has a question or a dispute concerning the possible workers' compensation benefits to which you may be entitled. You may or may not agree with the position taken by the employer or insurance company.

If you feel that you are not receiving the benefits to which you are entitled, you should discuss this with your employer or a representative of its insurance company. If you have already done that or you are not satisfied with the discussion, you may file a formal application for mediation or hearing. You can obtain the appropriate forms or more information by contacting the Workers' Compensation Agency at our toll-free number of 1-888-396-5041 (if necessary, a TTY device is available at 517-322-5987). Additional information may also be found on our website at www.michigan.gov/wca.

The Department of Labor & Economic Growth will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability, or political beliefs. If you need assistance with reading, writing, hearing, etc., under the Americans with Disabilities Act, you may make your needs known to this agency.

WC-107 (Rev. 11/04)

STATUTES

FEDERAL

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,... for the purpose of executng such scheme or artifice or attempting so to do, places in any post office or authorized depository for maill matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,00,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1843

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be

fined under this title or imprisoned not more five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,00,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1961. Definitions

As used in this chapter

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471,472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511

(relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 23412346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave

traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of

racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations

authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the

conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding

sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall stop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

STATE STATUTES AND ADMINISTRATIVE RULE

MCL Sec. 301. (1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employees' dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

MCL 418.315. (1) The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of an d in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this sate as legal, when they are needed. However, an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service was included in

the definition of practice of optometry under section 17401 of the public health code, 1978 PA 368, CL 333.17401, as of May 20 1992. An employer is not required to reimburse or cause to be reimbursed charges of services performed by a profession that was not licensed or registered by the laws of this state of or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998. Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee's spouse, brother, sister, child, parent, or any combination of these persons. After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The employer or the employer's carrier may file a petition objecting to the named physician selected by the employee and setting forth reason for the objection. If the employer or carrier can show cause why the employee should not continue treatment with the named physician of the employee's choice, after notice to all parties and a prompt hearing by a worker's compensation magistrate, the worker's compensation magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician from the date the order is mailed. The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation

magistrate. The work's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

MCL 418.631. (1) If any insurer licensed to transact the business of workmen's compensation insurance within this state repeatedly or unreasonably fails to pay promptly claims for compensation for which it shall become liable or if it repeatedly fails to make reports to the director as provided in this act, the director may recommend to the commissioner of insurance that the license of the company be revoked, setting forth in detail the reasons for his recommendation. The commissioner shall thereupon furnish a copy of the report to the insurer and shall set a date for a hearing, at which both the insurer ad the director shall be afforded an opportunity to present evidence. If after the hearing the commissioner is satisfied that the insurer has failed to live up to al of its obligations under this act, he shall promptly revoke its license otherwise he shall dismiss the complaint.

Rule 408.33. (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier and the self-insurers' security found shall notify the bureau, on form 107, if the right of the injured or dependent to compensation is disputed. If compensation thereafter is paid, report it on form 701. A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

(2) The following subdivisions govern the administration and enforcement of the penalty provisions under section 801 of the act:

(a) Under section 801(a) of the act, compensation shall be paid promptly and directly to the person entitled to compensation. Weekly benefits become due and payable on the fourteenth day after the employer has notice of

knowledge of the disability or death. On that date, all compensation which has accrued shall be paid. If benefits are not paid within 30 days of becoming due and payable, then the carrier shall pay to the employee $50.00 per [illegible] for each day after 30 days that the benefits rema[illegible]npaid, not to exceed $1,500.00.